evidence to assist in arriving at a decision. The meaning of the word "refer" in this sense is illustrated by its use in two sections 162 and 172 of the Code of Criminal Procedure in India which reads as follows:—

> "162. (i) No statement made by any person to a police officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at an inquiry or trial in respect of any offence under investigation at the time when such statement was made:
>
> Provided that, when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, the Court shall, on the request of the accused, refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872. Where any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.
>
> 172. (1) Every police officer making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through this investigation.
>
> (2) Any Criminal Court may send for the police diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial. Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but if they are used by the police officer who made them, to refresh his memory, or if the Court uses them for the purpose of contradicting such police officer, the provisions of the Indian Evidence Act, 1872, section 161 or section 145, as the case may be, shall apply."

The last part of section 113, sub-section (ii) "and such statement.....ordinance" allows the use of the statement in the second way, that is to impeach the credit of the witness who made it in manner provided by the Evidence Ordinance. That manner is laid down at section 155, clause (c) of the Evidence Ordinance as follows:—

> "The credit of a witness may be impeached in the following ways by the adverse party or, with the consent of the Court, by the party who calls him:—
>
> (c) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted."

To impeach the witness's credit, therefore, his inconsistent statement must be proved. As the statement now in question was required by section 112 to be reduced to writing, the writing is the only evidence admissible to prove this statement; but the writing by itself cannot prove that the accused was the person who made this statement therein contained. That fact must proved by the evidence of the officer who examined the accused and reduced the statement to writing, or by the interpreter, or by some other means. In this trial the writing was admitted in evidence and marked without proof that it was the accused who made the statement contained in the writing though the prosecutor had the witnesses necessary to prove that fact in attendance. Section 80 Evidence Ordinance contains no presumption which will rectify that omission.

It may be objected that the statement Exhibit "C" amounts to a confession made by an accused person to a police officer while in custody, and that such a statement is absolutely inadmissible in evidence by virtue of section 26 Evidence Ordinance. The answer is that this statement may amount to a confession yet the words "notwithstanding the provisions elsewhere contained in the Straits Settlements Evidence Ordinance 1893" in section 113, sub-section (ii) the exclusion of sections 25 and 26 Evidence Ordinance from section 113, sub-section (iii), and the trend of the amendment of section 113 (ii) in Enactment 22/26 by section 6 of Enactment 33/32 are three reasons for holding that the legislature contemplated and provided that section 26 Evidence Ordinance must yield to section 113 Criminal Procedure Code on this particular point.

I am therefore of opinion that the statement of the accused was wrongly admitted in evidence and marked Exhibit "C" in this case. Apart, however, from the statement there was ample evidence to prove the charge against the accused, and the admission of the statement in evidence has worked no injustice to him. I therefore concurred that this appeal should be dismissed, and the conviction and sentence affirmed.

Appeal dismissed.

[ORIGINAL CIVIL JURISDICTION]

TERRELL, Ag. C. J.

August 4, 1933.

IN RE THE ESTATE AND EFFECTS OF THOMAS ALBERT DUFFY, DECEASED.

[SELANGOR PROBATE No. 75 of 1933]

Probate and Administration Enactment, 1920, sections 5, 6, and 39—Probate—Will proved Abroad—Probate of Copy.

The deceased died leaving a will whereby he appointed two executors, one resident in Australia and the other in the Federated Malay States. The original will was proved in Australia, and, in accordance with the provisions of law, the original will was deposited in the Supreme Court of New South Wales.

The executor residing in the Federated Malay States obtained a properly authenticated copy of the will and applied for probate of such copy.

Held, that there is no provision in the Probate and Administration Enactment, 1920, empowering the Court to grant absolute probate of a copy of a will, but probate can be granted under section 39 limited until such time as the original will is produced.

V. Mackie for the petitioner.

Cur. Ad. Vult.

TERRELL, AG. C.J.—The deceased T. A. Duffy died leaving a will whereby he appointed the Perpetual Trustee Company (Ltd.) and the petitioner executors. The original will was proved by the Perpetual Trustee Company in Australia, and in accordance with the provisions of

law the original will has been deposited in the Supreme Court of New South Wales in Sydney.

The other executor, who is resident in the Federated Malay States, has obtained a properly authenticated copy of the will, and applies for probate of such copy, leave being reserved to the other executor to come in and prove.

Unfortunately the Probate and Administration Enactment, No. 4 of 1920, does not make specific provision for this case. Sections 5 and 6 read as follows:—

> 5. "When a will has been proved and deposited in a Court of competent jurisdiction situated beyond the limits of the Federated Malay States, and a properly authenticated copy of the will is produced, letters of administration may be granted with a copy of such copy annexed."
>
> 6. "Probate can be granted only to an executor appointed by the will."

Counsel for the petitioner argued that they should be read together, and that by implication there is jurisdiction to grant to an executor probate of an authenticated copy of a will.

But the sections do not clearly so state, and that it is to be observed that the section in the Colony corresponding to section 5 is section 840 of the Civil Procedure Code which reads as follows:—

> 5. "When a will has been proved and deposited in a Court of competent jurisdiction situated beyond the limits of the Colony, and a properly authenticated copy of the will is produced, probate may be granted of such copy or letters of administration may be granted with a copy of such copy annexed."

I do not think that it is possible to grant absolute probate of a copy when the section only provides for granting letters of administration with the will annexed.

It is, however, possible to make a grant under section 39 limited until the original will is produced. This would be in accordance with the English practice, see *In the goods of Lemme*, (1892) p. 89 and *In the goods of Von Linden*, (1896) p. 148. In each of these cases the original will was in the hands of a notary public out of the jurisdiction, and such will could never be produced. Probate was granted of an authenticated copy until such time as the original will was brought in.

I order, therefore, that a grant of probate issue to the petitioner limited to such time as the original will is brought in, leave being reserved to the Perpetual Trustee Company (Ltd.) to come in and prove.

Order accordingly.

[ORIGINAL CRIMINAL JURISDICTION]
HEREFORD, J.
June 19, 1933.

RE ABDUL HAMID BIN JAMAL....Applicant

[PERAK CRIMINAL APPLICATION No. 10 of 1933]

Extradition—Procedure—Extradition Enactment, 1914, sections 10 and 11—Application by prisoner for discharge—Criminal Procedure Code, 1926, sections 363 and 364.

An application to the Supreme Court for the discharge of a person detained under the Extradition Enactment, 1914, must be made under section 363 of the Criminal Procedure Code, 1926 and supported by an affidavit as required by section 364.

M. S. Mahendran for the applicant.

L. C. Simpson-Gray, Deputy Public Prosecutor for the Public Prosecutor.

HEREFORD, J.—In this case, the accused, who was arrested in Teluk Anson, was brought before the Magistrate with a view to extradition to the Netherlands East Indies.

By sections 9 and 10 of "The Extradition Enactment, 1914" it is provided that when a fugitive criminal is brought before the Magistrate, he shall hear the case in the same manner and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him accused of an offence committed within his jurisdiction and triable by the Supreme Court, and in the case of a fugitive criminal accused of an extradition crime it is provided that:

> (i) if the foreign warrant authorising the arrest of such criminal is duly authenticated, and
>
> (ii) if such evidence is produced as would according to the law in force in the Federated Malay States justify the committal for trial of the prisoner if the crime of which he is accused had been committed in the Federated Malay States,

the Magistrate shall commit him to prison, but otherwise shall order him to be discharged.

In this case the foreign warrant does not appear even to have been produced, nor was any evidence recorded which would justify the committal of the prisoner for trial if the crime of which he is accused had been committed in the Federated Malay States.

The prisoner now applies for his discharge. The application is not opposed by the Deputy Public Prosecutor and as the learned Magistrate, before whom proceedings were taken, has not complied with the provisions of section 10 of the Enactment, there is no alternative but to discharge him.

I cannot find that the foreign warrant had even been received in the State, nor that any local warrant was issued under the provisions of the Extradition Enactment, and in this respect also it seems to me that the provisions of the Enactment were not carried out.

The application to the Supreme Court is described at the head thereof as, "In the matter of the Extradition Enactment No. 26 of 1914, section 11, sub-section (1)." The section quoted does not appear to provide for such an application which should properly have been made under section 363, sub-section (1) of the Criminal Procedure Code. The application should have been supported by an affidavit as provided for by section 364 of the Code. No affidavit was put up and the proceedings were in fact brought in an irregular way. The point was however, not taken by the Deputy Public Prosecutor but the procedure should be followed in a similar case in future.